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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 16 2007

WAC 06 010 50206

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a semiconductor company. It seeks to employ the beneficiary permanently in the United States as a circuit design engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. As will be discussed in greater detail below, the petitioner did not submit the required initial evidence initially or in response to the director's request for additional evidence and, thus, we cannot consider the evidence submitted on appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on July 21, 2005. The proffered wage as stated on the ETA Form 9089 is $86,216 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 24, 2005.

On the petition, the petitioner claimed to have an establishment date in 2003, a gross annual income of "VCF $40,000,000," a net income of "VCF $40,000,000" and 137 employees. In the initial cover letter, counsel asserted that the petitioner has $40,000,000 in venture capital. Thus, "VCF" would appear to stand for venture capital funding, which is not responsive to the petition's request for gross and net income figures. In support of the petition, the petitioner submitted unaudited financial statements and bank statements reflecting payments to the petitioner's payroll managing firm.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 9, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. *In addition* to these materials, the director also requested the beneficiary's 2005 Form W-2, Wage and Tax Statement and evidence of wages paid to the beneficiary in 2006.

In response, the petitioner submitted additional unaudited financial statements, the beneficiary's 2005 Forms W-2 and the beneficiary's 2006 pay statements.

The director determined that the evidence submitted was not the initial required evidence set forth in the regulation at 8 C.F.R. § 204.5(g)(2) and did not establish that the petitioner had the continuing ability to pay the proffered wage in 2005.

On appeal, filed August 11, 2006, counsel asserts that the petitioner's 2005 tax return was not available at the time the petition was filed and is still not complete as the company received an extension until September 2006. Counsel further asserts that the petitioner does not prepare annual reports. Counsel notes that the petitioner employs over 100 employees and, thus, can rely on a letter from a financial officer of the company. Counsel relies on minutes from meetings between two Service Centers and the American Immigration Lawyers Association (AILA), which are not binding on this office, and a memorandum, Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2), HQOPRD 90/16.45, William Yates, Associate Director for Operations, U.S. Citizenship and Immigration Services, May 4, 2004. The petitioner submits its 2003 and 2004 Internal Revenue Service Form 1120 U.S. Corporation Income Tax Returns. The petitioner also submits a summary balance sheet reflecting tri-monthly figures for March 31, 2005 through June 30, 2006. Finally, the petitioner submits a letter from [redacted] its Chief Operating Officer, who attests to the petitioner's employment of over 100 employees and its ability to pay the proffered wage. This letter is supported by quarterly wage and withholding reports confirming that the petitioner employs over 100 employees.

The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner "shall" submit annual reports, audited financial statements or federal tax returns. The regulation then provides additional documentation that may also be submitted. The memorandum submitted by counsel makes clear that consideration of wages already paid to the beneficiary and or a letter from a financial officer of a company employing more than 100 employees is only appropriate after the initial required evidence has been submitted. The memorandum specifically provides that the director need not request a letter from a financial officer.

The regulation at 8 C.F.R. § 204.5(g)(2) sets forth the initial required evidence in this matter. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§

103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* While we recognize that the petitioner's 2005 tax return was unavailable, the petitioner's 2004 tax return was prepared prior to the director's request for evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The unaudited financial statements that the petitioner submitted with the petition and in response to the director's request for additional evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, however, the petitioner did not submit the required initial evidence.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of July 21, 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.